Supreme Court, U.S.
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No. 87-989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

XANADU OF COCOA BEACH, INC.,
a Florida corporation,
Petitioner,

vs.

MARVIN A. ZETLEY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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December 28, 1987

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QUESTIONS PRESENTED

Respondent agrees upon the issue presented by petitioner.

PARTIES TO THE PROCEEDING BELOW

In the proceedings before the United States District Court for the Middle District of Florida, Orlando Division, the plaintiff was XANADU OF COCOA BEACH, INC., a Florida corporation. The defendant was MARVIN A. ZETLEY. MARVIN A. ZETLEY was the third-party plaintiff against C&C DEVELOPMENT, INC., a Florida corporation, and KENNETH E. ALLES, as the third-party defendant.

Upon the appeal to the United States Court of Appeals for the Eleventh Circuit, the appellant was MARVIN A. ZETLEY (defendant below) and the appellee was XANADU OF COCOA BEACH, INC., (plaintiff below). C&C DEVELOPMENT, INC. and KENNETH E. ALLES did not participate in the appeal.

XANADU OF COCOA BEACH, INC. is the petitioner in this Court. MARVIN A. ZETLEY is the respondent in this Court.

RULE 28.1 LISTING

Counsel for petitioner did not submit this information in their brief. Therefore, it is provided herein by respondent. XANADU OF COCOA BEACH, INC. is a Florida corporation. It is a wholly owned subsidiary of TOWNE REALTY, INC., a Wisconsin corporation, located in Milwaukee, Wisconsin. TOWNE REALTY, INC. is a wholly owned subsidiary of ZILBER LTD, a Wisconsin corporation, located in Milwaukee, Wisconsin. ZILBER LTD. is wholly owned by family trusts established by JOSEPH J. ZILBER, a real estate entrepeneur, of Milwaukee, Wisconsin.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, MARVIN A. ZETLEY, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 822 F.2d 982 (1987).

RELEVANT OPINIONS AND ORDERS BELOW

1. The opinion of the Eleventh Circuit, issued July 24, 1987, is reported at 822 F.2d 982 (1987), and is reproduced at Appendix "C" of the petitioner's brief.

2. The order of the Eleventh Circuit dated August 27, 1987, denying the Petition for Rehearing submitted by appellee below is reproduced at Appendix "E" of petitioner's brief.

3. The Findings of Fact and Conclusions of Law of the Trial Judge in the United States District Court for the Middle District of Florida, Orlando Division, dated May 1, 1986, are unpublished and reproduced at Appendix "A" of petitioner's brief.

4. The Pretrial Stipulation in the Trial Court dated November 13 and 14, 1985, a copy of which is reproducted at Appendix "F" in respondent's brief.

STATEMENT OF THE CASE

The Statement of the Case and Facts, as presented by petitioner, must be clarified and more accurately and fully presented by respondent.

XANADU OF COCOA BEACH, INC., entered into a joint venture agreement with SUNFLOWER CLUB, INC., a Florida corporation, on October 31, 1980, for the purpose of developing and constructing a high-rise condominium building in Cocoa Beach, Florida. SUNFLOWER was controlled by KENNETH E. ALLES. The agreement created a joint venture, XANADU OF COCOA BEACH, a joint venture, (hereafter "XANADU JOINT VENTURE"). The document was signed by JOSEPH J. ZILBER for the petitioner and by KENNETH E. ALLES for SUNFLOWER.

For the purposes of operation of XANADU JOINT VENTURE, the joint venture and the petitioner shared offices and employees with ALLES in Cocoa Beach, Florida. ALLES and C&C contracted in May, 1982, with ZETLEY to trade Florida condominiums being constructed and owned by XANADU JOINT VENTURE for the Brown Deer Racquet Club in Milwaukee, which consisted of indoor and outdoor tennis facilities, restaurant and bar, and outdoor swimming facilities. Conveyance was made by ZETLEY to C&C on May 20, 1982, but ZETLEY did not then receive the deeds to the Florida condominiums. The problems flowed from there.

ZETLEY was aware at the inception of the transaction that XANADU JOINT VENTURE was a ZILBER-ALLES joint venture. From the inception of the transaction, and continually thereafter, ZETLEY was advised and reassured by ALLES that he had authority for the joint venture to enter into the transaction and commit to the delivery of the deeds to the condominium units. Similar reassurance was given ZETLEY on several occasions by Gerald Stein, an officer of all ZILBER and TOWNE REALTY entities, and a social friend of ZETLEY. As early as the Summer of 1982, Stein told ZETLEY not to worry about the future delivery of deeds, and that "JOE" (ZILBER) would take care of everything at the appropriate time. If a problem was going to exist and made known to ZETLEY at that time, it would have been feasible to reverse the transaction without difficulty. ZETLEY relied upon the Stein reassurances.

ZETLEY made a commitment for the disposition of one of the condominium units to O'Keefe Centre, Ltd., a Michigan corporation, in an unrelated business transaction, but had repeated difficulty in getting a deed to that unit (Unit 1204). Finally, ZETLEY met with ZILBER in June and July, 1983, to prevail upon ZILBER to release the deed for Unit 1204. This was accomplished.

Discussion was also had concerning the deed for the other unit, Penthouse Unit 2, but no deed was delivered. A memo was given by ZILBER to Arthur Wigchers, the then Vice President of both the petitioner and of TOWNE REALTY, which concluded:

> "Also make sure Kenny (Alles) gets Zetley to agree to hold off on the second Xanadu unit for a long time."

The letter agreement then entered into on October 10, 1983, between ZETLEY and TOWNE REALTY, which finally brought about the physical release and delivery direct to O'Keefe Centre of the deed to Unit 1204, and which petitioner denominates as a complete release, commenced with words reading:

"In Re: Xanadu Condominium Unit No. 1204"

During the same time interval, in early October 1983, ZETLEY was given a key to Penthouse Unit 2 by an authorized employee of TOWNE REALTY and the petitioner. He took possession of the unit in early October 1983. He undertook, with the aid and assistance of representatives of the joint venture, the completion and furnishing of the unit. He spent a minimum of $15,000.00 on the physical completion of the unit, and in excess of $25,000.00 to furnish the unit. He moved into physical possession with his family prior to Christmas of 1983. His presence was open and known to members, employees, officers, and agents of XANADU JOINT VENTURE, some of whom visited ZETLEY in his condominium unit on more than one occasion.

On April 18, 1984, without knowledge by ZETLEY, XANADU JOINT VENTURE was terminated and ALLES was given deeds to two unrelated condominium units in the development, and the petitioner obtained a deed to the balance of the unsold units, including Penthouse Unit 2, which is the subject of this controversy.

No demand was ever made upon ZETLEY to surrender possession and occupancy of the Penthouse Unit 2 until the Summons and Complaint issued in the Florida State Court was served upon ZETLEY on November 23, 1984, in Milwaukee. He had been in possession and physical occupancy since October, 1983. The case was then removed to the District Court on petition of ZETLEY. After the rendition of judgment in the Trial Court in favor of the petitioner, the respondent, ZETLEY, vacated the unit in question pursuant to the judgment, from which the appeal was taken. Since the undertaking of the appellate process, the petitioner sold the unit involved to a third party.

REASONS FOR DENYING THE WRIT

The parties did not clearly and plainly stipulate in the Pretrial Stipulation that Wisconsin law should apply to the formation and interpretation of the contracts. The Pretrial Stipulation, a copy of which is attached in respondent's Appendix as Appendix "F," at pp. A-1 - A-19 clearly shows in paragraph 8(4) that the parties agreed that Florida substantive law applied as related to the petitioner's Complaint. An agreement on the applicability of Wisconsin substantive law was made only as it related to the Counterclaim of the third-party defendant. That is a matter not involved in either the appeal or in this Petition. It is true that the Trial Judge did apply Wisconsin law to some aspects of this transaction, and that no argument was made by either party on this point in the Eleventh Circuit proceedings. The Eleventh Circuit, in its opinion, did determine in its Decision, 822 F.2d 982, at 984-985, that because the real estate in question, being the condominum in dispute, was situated in Florida, and that Florida was the forum state:

> "All aspects of the contract — formation, validity, performance, and remedies — are to be determined in accordance with the principles of Florida law. The law of Florida, therefore, governs the validity and interpretation of any document or oral agreement intended to convey, or having the effect of conveying, any legal or equitable interest in Penthouse 2."

Petitioner contends that the Eleventh Circuit had no power to undertake the consideration of this issue which had not been argued by either of the parties, and contends that *Singleton v. Wulff*, 428 U.S. 106, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976) constitutes authority for the proposition that a federal appellate court shall not consider an issue not passed on below. Speaking for the majority, Justice Blackmun stated at p. 121:

> "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to

> the discretion of the courts of appeal. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below . . . where injustices might otherwise result."

The subject was considered earlier in *Hormel v. Helvering,* 312 U.S. 552, 85 L.Ed. 1037, 61 S.Ct. 719 (1941), in which a challenge was made to the power of the Circuit Court of Appeals to pass upon questions that had not been directly and squarely presented to the Board of Tax Appeals below. Responding to this argument, Justice Black stated at 312 U.S 552, 557:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically argued would be out of harmony with this policy."

and, further at p. 558:

> " . . . such appellate practice should not be applied where the obvious results would be a plain miscarriage of justice."

Neither of the parties hereto were prejudiced by the fact that the Eleventh Circuit made a determination in its opinion at 822 F.2nd 982, 984-985, that Florida legal principles were to control certain issues in this case relating to the interpretation of the letter agreement between ZETLEY and TOWNE REALTY captioned "In Re: Xanadu Condominium Unit 1204," since neither side raised that issue on the appeal. It occurred on the Eleventh Circuit's own initiative because it obviously saw plain error of law that had to be corrected. Authority for such procedure can be found in *DeFonce Construction Company v. City*

of Miami, 256 F.2d 425, (5th Cir., 1958), where, at p. 428, the then 5th Circuit stated:

> " . . . this court can and will notice plain error called to its attention by counsel or appearing to our own observation."

Counsel for petitioner presents a tortured argument of the existence of an alleged conflict between the decision of the Eleventh Circuit in this case and with decisions of the Ninth Circuit. It is a false conflict that has been presented. All that has been established is that the courts of appeal have discretionary power to act where necessary, as discussed in *Singleton* and *Hormel.* Additional demonstrations of authority to consider a legal issue for the first time on an appeal, even though not presented by the parties, are found in *American Surety Co. of N.Y. v. Colblentz,* 381 F.2d 185 (5th Cir., 1967); *Empire Life Insurance Co. of America v. Valdak Corp.,* 468 F.2d 330, 334 (5th Cir., 1972); *Mercury Motor Express, Inc. v. Brinke,* 475 F.2d 1086, 1091 (5th Cir., 1973); *Ricard v. Birch,* 529 F.2d 214 (4th Cir., 1975); *Martinez v. Mathews,* 544 F.2d 1233, 1237 (5th Cir., 1976); and *French v. Estelle,* 696 F.2d 318, 319 (5th Cir., 1983). These citations are but a mere sampling of many that uniformly hold that the principle of not hearing issues being raised for the first time on appeal must be relaxed where the question is one of law and failure to hear it would result in a miscarriage of justice. There is a further distinction in the instant case in that the legal issue was not raised by either party on the appeal. The Court of Appeals took it up on its own motion. Judge Goldberg, in *Empire Life Insurance Co., Supra,* at p. 334, pointed out that the appeals court has to fulfill its duty to apply the correct law and get the case back on the right track, and not acquiesce in "the erroneous application of law indulged in by all parties below," and that "neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility."

Mercury Motor Express, Supra, at p. 1091, further cites as authority the recognized texts of 9 *Moore's Federal Practice,* para 110.25[1] (2d Ed. 1972), and 3 *Barron & Holzhoff, Federal Practice and Procedure,* sec. 1440 (Wright Ed. Supp. 1971). Chief Judge Haynesworth of the 4th Circuit, in *Ricard v. Birch, Supra,* at p. 216, quotes succinctly from *Washington Gas Light Co. v. Virginia Electric & Power Co.,* 438 F.2d 248, 250-251 (4th Cir., 1971):

> " . . . if deemed necessary to reach the correct result, an appellate court may *sua sponte* consider points not . . . even raised on appeal by any party."

Singleton clearly holds that the application and exercise of discretion must be measured and considered on a case by case basis. The issue raised by petitioner is not one of significance and importance to warrant a review of the exercise of discretion by the Court of Appeals. Based upon the facts of this case, petitioner is in error in seeking to invoke the jurisdiction of the United States Supreme Court in order to reconsider the application of Florida law to the factual issues in this case.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari because no conflict exists between the decision and opinion of the Eleventh Circuit herewith with rulings of other circuits. The Eleventh Circuit has relied upon a well founded line of decisions of this Court holding that it is a matter of discretion of the Court of Appeals whether it is to make a ruling upon an issue *sua sponte* not raised by the parties. The Eleventh Circuit has followed a long line of precedent from its parent circuit, the Fifth Circuit, holding that it must avoid a miscarriage of justice that could result from blinding their eyes from a clear error of law at the trial court level which affected a significant aspect of the case.

The decision below was correct. The fact that the Eleventh Circuit Court of Appeals rejected the argument presented in this Petition in the Petition for Rehearing submitted to the Eleventh Circuit (Appendix "D" and "E," Petitioner's Appendix, pp. A-33-43) clearly demonstrates that the issue was thoroughly considered below, and no abuse of discretion existed on the part of the Eleventh Circuit for acting *sua sponte*. The issue raised on this Petition affects few, other than the litigants herein, and is not important enough to warrant this Court granting certiorari and accepting the case for review. The Petition for Writ of Certiorari to the Eleventh Circuit should be denied. Res-

pondent should be permitted to return to the Trial Court to complete the trial of this action with the application of correct legal principles to the issues.

Respectfully submitted,

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December 28, 1987

APPENDIX

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 84-977-CIV-ORL-18

XANADU OF COCOA BEACH, INC.
a Florida corporation,
Plaintiff,

v.

MARVIN A ZETLEY,
Defendant/Third-Party Plaintiff,

v.

C & C DEVELOPMENT, INC.
a Florida corporation, and
KENNETH E. ALLES,
Third-Party Defendants

PRE-TRIAL STIPULATION

Pursuant to Rule 3.06(b) M.D. Fla. R., counsel for the parties have conferred on several occasions, both in person and by telephone, within the past ninety (90) days. As a result thereof, the parties have concluded that settlement is unlikely, and herewith submit the Pre-Trial Stipulation as required by Local Rule 3.06(b).

1. THE BASIS OF FEDERAL JURISDICTION.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. Sec. 1332, in that the plaintiff is a Florida corporation, the defendant/third-party plaintiff is a Wisconsin citizen, and the third-party defendants are Florida citizens and residents. The amount in controversy exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs.

2. STATEMENT OF THE NATURE OF THE ACTION.

Plaintiff has sued in two counts. The first is an action for ejectment of the defendant from a condominium unit (PH-2), owned by plaintiff, situate in Brevard County, Florida, and for damages for lost profits during the period of time defendant has wrongfully occupied said unit. The second count is an action for slander of title based on defendant having filed and recorded a Notice of Lis Pendens in this action without the proper basis in law or fact; said Notice of Lis Pendens was dismissed by the Court upon motion of plaintiff.

The defendant, ZETLEY, has answered with certain affirmative defenses, and has filed a Counterclaim with two counts seeking declaratory relief establishing and quieting title in his name, and for recovery of damages in the sum of Three Hundred Fifty Thousand and no/100 ($350,000.00) Dollars, being the alleged reasonable value of the property.

ZETLEY, as a third-party plaintiff, maintains an action against C & C DEVELOPMENT, INC., and KENNETH E. ALLES, seeking in several counts specific performances of a contract for delivery of title of record to the condominium unit in question; Three Hundred Fifty Thousand and no/100 ($350,000.00) Dollars damages, plus interest, based on a Note, in the event ZETLEY does not obtain title; and Seventy Five Thousand and no/100 ($75,000.00) Dollars additional damages pursuant to agreements with the third-party defendants.

Finally, the third-party defendant, C & C DEVELOPMENT, INC., has filed a Counterclaim in two counts. Count One is for damages for breach of contract and Count Two is for damages for fraud and misrepresentation relating to the same agreements. The agreements under which suit is brought by the third-party defendants are the same under which the defendant based his Third-Party Complaint.

3. GENERAL STATEMENT OF EACH PARTY'S CASE

A) Case of Plaintiff, XANADU OF COCOA BEACH, INC.

Plaintiff seeks ejectment of the defendant from a condominium unit it holds title to, situate in Brevard County, Florida. Plaintiff maintains that the defendant has no legal or equitable ownership interest nor possessory right to said unit. Plaintiff bases its assertions on the following grounds, which are disputed and denied by defendant:

(1) The contractual agreements under which defendant claims an ownership interest are not with the plaintiff, nor did the other contracting parties have authority, either express, implied, or apparent, to act on behalf of or as agents of plaintiff. Furthermore, the defendant knew the agreement was not with nor binding upon the plaintiff.

(2) Defendant has released plaintiff from any claim to said condominium unit or for an action for damages.

(3) The terms of the agreements under which defendant claims an ownership interest specifically provide a sole and exclusive remedy for damages, thereby barring any action to quiet title.

(4) Any action by defendant for quiet title to said condominium unit is barred by the statute of frauds.

(5) Plaintiff's action for slander of title is based upon defendant's wrongful filing and recording of a Notice of Lis Pendens without proper basis in law or fact.

B) Case of Defendant, MARVIN A. ZETLEY, With Respect to Claims of XANADU OF COCOA BEACH, INC.

ZETLEY has denied the propriety of plaintiff's claim of title, contending that it obtained the interest of co-joint venturer, which was the alter ego of third-party defendants, to the detriment and exclusion of ZETLEY'S claims of ownership interest through collusion in an effort to defraud ZETLEY. ZETLEY also relies on the defense of laches, stating he has been in open, continuous, and exclusive possession of the unit since October 18, 1983.

ZETLEY has counterclaimed seeking declaratory relief of quieting title, free of liens and unencumbered, in his name, and, in the alternative, for the recovery of compensatory damages of Three Hundred Fifty Thousand and no/100 ($350,000.00) Dollars being the claimed value of the condominium.

C) Case of Third-Party Plaintiff, MARVIN A. ZETLEY, Against Third-Party Defendants, C & C DEVELOPMENT, INC., and KENNETH E. ALLES.

ZETLEY sets forth three separate counts against C & C and ALLES. First, he demands specific performance of certain contractual agreements concerning the delivery of a deed, free and clear of all encumbrances, to him for the condominium unit in question. Second, in the alternative, he seeks compensatory damages, based on a Promissory Note for Three Hundred Fifty Thousand and no/100 ($350,000.00) Dollars in default of getting title to the condominium unit, together with interest at 20% per annum commencing on and after October 1, 1983. Finally, by reason of the failure of the third-party defendants to deliver title to the condominium to ZETLEY by October 31, 1983, and pursuant to additional writing executed by third-party defendants, ZETLEY seeks the recovery of Seventy Five Thousand and no/100 ($75,000.00) Dollars, being certain stipulated damages.

D) Case of Third-Party Defendants With Respect to ZETLEY.

Third-party defendant, C & C DEVELOPMENT, INC., has brought a Counterclaim against the defendant/third-party plaintiff based upon alleged fraudulent misrepresentations made by defendant relative to the sale of the Brown Deer Racquet Club located in Wisconsin to the third-party defendant under the agreements attached to the defendant's Third-Party Complaint. Third-party defendant, C & C DEVELOPMENT, INC., alleges that the factual representations made by the defendant/third-party plaintiff regarding the fair market value, financial condition, and present income produced by said racquet club were false and known to be false by the defendant/third-party plaintiff at the time they were made, thus providing the basis for the third-party defendant's action for breach of contract and fraud and misrepresentation.

ZETLEY denies any fraud or misrepresentation and denies third-party defendants suffered any damages whatsoever, and alleges that they actually resold the property almost immediately after its acquisition at a substantial profit.

4. LIST OF ALL EXHIBITS TO BE OFFERED AT TRIAL

A) Plaintiff's Exhibits.

(1) Copy of Warranty Deed from Sand Dunes Properties, Inc. to XANADU OF COCOA BEACH, INC. and Sunflower Club, Inc., d/b/a Xanadu Joint Venture.

(2) Copy of Warranty Deed from Xanadu Joint Venture, by Sunflower Club, Inc. and XANADU OF COCOA BEACH, INC., to XANADU OF COCOA BEACH, INC.

(3) Declaration of Condominium of Xanadu, a condominium, dated March 21, 1983.

(4) Copy of release dated September 21, 1983 from defendant to plaintiff.

(5) Certificate of Occupancy for Xanadu Condominium.

(6) Any documents listed by the defendant.

B) Defendant's Exhibits.

1) **Closing Statement.** ZETLEY - C & C 5/20/82 re: 9418 North Green Bay Road, Milwaukee, Wisconsin.

2) **Warranty Deed.** ZETLEY to C & C, 5/20/82 re: 9418 North Green Bay Road, Milwaukee.

3) **Wisconsin Real Estate Transfer Tax Return.** 5/20/82 re: 9418 North Green Bay Road, Milwaukee.

4) **Lease.** 5/20/82 - between C & C and Brown Deer Racquet Club (for restaurant and bar).

5) **Promissory Note.** 5/20/82, C & C to ZETLEY with guaranty by ALLES, for $500,000.00.

6) **Promissory Note.** 5/20/82, C & C to ZETLEY with guaranty by ALLES, for $150,000.00.

7) **Promissory Note.** 5/20/82, ALLES to ZETLEY for $150,000.00.

8) **Check No. 1396.** Brown Deer Racquet Club to C & C, 5/28/82, for $50,730.55.

9) **Ledger Sheet Calculation** of refunds in sum of $50,730.55 due C & C from ZETLEY.

10) **Memorandum Agreement** of 6/2/82 between ZETLEY, C & C, and ALLES.

11) **Letter 6/4/82** Mequon Racquet Club to ALLES.

12) **Letter 6/4/82** Attorney Thomas M. Kells to ZETLEY.

13) **Agreement of 11/11/82** between ZETLEY, Brown Deer Racquet Club, C & C, and ALLES relinquishing claim by ZETLEY to Xanadu Condominium Unit 505, and releasing ZETLEY and Brown Deer Racquet Club from lease of 5/20/82.

14) **Obligation 1/1/83** for $20,000.00 from C & C and ALLES to ZETLEY.

15) **Owner's Affidavit** by Scott Alles for Xanadu Joint Venture, 5/13/83, for Xanadu Condominium Unit 1204.

16) **Agreement of 6/30/83,** C & C and ALLES to ZETLEY for $75,000.00 liability.

17) **Closing Statement 8/20/83,** Trade of 9418 North Green Bay Road, Milwaukee (Mequon Racquet Club) ALLES-Huber-Carr.

18) **Preliminary Title Commitment No. 10-0227-10-001620,** 9/1/83, for Xanadu Condominium Unit 1204, Chicago Title Insurance Company.

19) **Closing Statement 5/13/83** re: Xanadu Condominium Unit 1204 transferred to O'Keefe Centre Ltd.

20) **Mutual General Release 10/6/83** between ZETLEY, C & C, and ALLES.

21) **Promissory Note 10/1/83** $350,000.00 C & C and ALLES to ZETLEY.

22) **Letter, ZETLEY to C & C and ALLES 2/17/84** demanding title evidence for Xanadu Penthouse Unit 2.

23) **Letter, ZETLEY to C & C 4/28/84** demanding closing and title to Xanadu Penthouse Unit 2.

24) **Letter, ZETLEY to C & C and ALLES 7/19/84** demanding damages.

25) **Memorandum** Alan Dolenshek to ALLES concerning resale of Brown Deer Racquet Club to George Eisen, et al.

26) **Letter of Intent, 5/10/82,** Mequon Racquet Club, a Wisconsin limited partnership, to ALLES, concerning purchase of 9418 North Green Bay Road, Milwaukee.

27) **Amendment of Letter of Intent, 5/12/82,** Mequon Racquet Club to Alles.

28) **Land Contract,** C & C to Mequon Racquet Club, 5/21/82, re: 9418 North Green Bay Road, Milwaukee.

29) **Quit Claim Deed 4/28/84,** Xanadu Joint Venture to XANADU OF COCOA BEACH, INC., covering Xanadu condominium unit Ph-2, and other parcels.

30) **Letter of Transmittal 8/19/83,** Mequon Racquet Club to C & C tendering Quit Claim Deed.

31) **Quit Claim Deed 8/21/83,** Mequon Racquet Club to C & C re: 9418 North Green Bay Road, Milwaukee.

32) **Wisconsin Real Estate Transfer Tax Return 9/5/83,** Mequon Racquet Club to C & C re: 9418 North Green Bay Road, Milwaukee.

33) **Letter of Transmittal 9/5/83,** Mequon Racquet Club to C & C.

34) **Letter 8/22/83** Mequon Racquet Club to C & C.

35) **Letter Agreement** Towne Realty, Inc. to ZETLEY dated 9/21/83, signed by ZETLEY on 10/10/83.

36) **Letter, Attorney Charles F. Schalmo** (for C & C) to ZETLEY, 10/12/83.

37) **Xanadu Joint Venture Agreement** 10/31/80 between XANADU OF COCOA BEACH, INC. and Sunflower Club, Inc.

38) **Amendment to Xanadu Joint Venture Agreement** dated 12/15/81.

39) **Termination of Xanadu Joint Venture with handwritten addenum** dated 4/18/84.

40) **Memorandum** Arthur W. Wigchers to Joseph J. Zilber, et al dated 2/18/83.

41) **Letter** Charles F. Schalmo to Towne Realty, Inc. dated 8/1/83.

42) **Warranty Deed, Xanadu Joint Venture to O'Keefe Centre, Ltd.** re: Xanadu condominium unit 1204, dated 5/13/83.

43) **Memorandum,** Zilber to Wigchers dated 7/28/83.

44) **Promissory Note 9/30/81,** Unicare Health Facilities, Inc. to MARVIN A. ZETLEY $100,000.00.

45) **Assignment of Note of 9/30/81** ZETLEY to C & C and ALLES dated 7/29/83.

46) **Assignment of Note 9/30/81** C & C and ALLES to Towne Realty, Inc. dated 10/10/83.

47) **Memorandum** Wigchers to James Young dated 9/21/83.

48) **Memorandum** dated 10/5/83, Wigchers to Zilber, et al.

49) **Memorandum** dated 3/29/84, Wigchers to Zilber, et al.

50) **Quit Claim Deed, Xanadu Joint Venture to Schill,** 4/18/84, Xanadu condominium unit 306.

51) **Quit Claim Deed, Xanadu Joint Venture to Sunflower Club, Inc.,** 4/18/84, Xanadu condominium unit 503.

52) **Memorandum,** James B. Young to Arthur Wigchers dated 6/8/84.

53) **Xanadu Sales Report 10/31/82.**

54) **Xanadu Sales Report 1/31/83.**

55) **Xanadu Sales Report 5/21/83.**

56) **Xanadu Sales Report 5/24/83.**

57) **Memorandum** from Arthur Wigchers 5/25/83.

58) **Memorandum** undated written Memorandum (Deposition Exhibit 65.)

59) **Memorandum** undated written Memorandum. (Deposition Exhibit 66.)

60) **Xanadu Sales Report** 6/23/83.

61) **Memorandum,** Rudy Rutkowski to Wigchers 8/10/83.

62) **Memorandum** Rutkowski to Wigchers 2/27/84.

63) **Xanadu Income Projection Memorandum** dated 3/28/84. (Deposition Exhibit 70.)

64) **Xanadu Income Projection Memorandum** dated 3/28/84. (Deposition Exhibit 71.)

65) **Memorandum** Wigchers to Zilber, et al dated 4/3/84.

66) **Memorandum** Wigchers to Zilber, et al dated 9/13/84.

67) **Warranty Deed** to Brown Deer Racquet Club property from C & C DEVELOPMENT, INC. to John D. Huber dated August 22, 1983.

68) Defendant, MARVIN A. ZETLEY, reserves the right to offer additional exhibits at time of trial which may become relevant.

C) **Third-Party Defendant's List of Exhibits.**

(1) Copy of pro forma statement of earnings received from defendant prior to sale of the Brown Deer Racquet Club.

(2) Copy of Contract of Sale and Purchase of Brown Deer Racquet Club entered into between defendant and third-party defendant, C & C.

(3) Copies of any and all Federal Income Tax Returns filed by MARVIN A. ZETLEY and/or Brown Deer Racquet Club during the calendar years that ZETLEY operated the Brown Deer Racquet Club per Request to Produce.

(4) All documents listed by third-party plaintiff.

All parties reserve the right to object to materiality and relevancy of all exhibits, and to further object to same on basis of hearsay. Plaintiff objects to authenticity of defendant's Exhibits 8 and 9.

5. LIST OF ALL WITNESSES WHO MAY BE CALLED AT TRIAL

A) **Plaintiff's List of Witnesses.**

(1) KENNETH E. ALLES.

(2) James B. Young.

(3) Defendant, MARVIN A. ZETLEY.

(4) All witnesses listed by defendant.

B) Defendant, ZETLEY'S List of Witnesses.

1) MARVIN A. ZETLEY

2) KENNETH E. ALLES, adversely

3) Arthur B. Wigchers, Jr., adversely

4) James B. Young, adversely

5) Joseph J. Zilber, adversely

6) Alan Dolenshek

7) Marilyn Zetley

8) George Eisen

9) Arnold Matayas

10) Gerald Stein, adversely

11) Defendant, ZETLEY, reserves the right to call any and all of the witnesses of plaintiff and/or third-party defendants as adverse witnesses.

C) Third-Party Defendants

(1) KENNETH E. ALLES.

(2) George Eisen.

(3) Defendant/third-party plaintiff, MARVIN A. ZETLEY.

(4) All witnesses listed by third-party plaintiff.

6. DEPOSITIONS

(1) KENNETH E. ALLES, dated May 30, 1985, in its entirety.

(2) James B. Young, dated July 24, 1985, in its entirety.

(3) Arthur Wigchers, Jr., dated July 24, 1985, in its entirety.

(4) Joseph J. Zilber, dated July 25, 1985, in its entirety.

(5) MARVIN A. ZETLEY, dated May 30, 1985, in its entirety.

7. STATEMENT OF ADMITTED FACTS WHICH WILL REQUIRE NO PROOF AT TRIAL.

1) Plaintiff is presently the record title owner of condominium unit Ph-2, Xanadu Condominium, Cocoa Beach, Florida.

2) Defendant did file and record a Notice of Lis Pendens against said condominium unit on December 11, 1984.

3) During the early part of October 1983, ZETLEY was given a key to the Penthouse Unit, and began the decorating and furnishing of the Unit. It was completed, and ZETLEY physically moved in with his family prior to Christmas in 1983, and he has retained possession and occupancy since that time.

4) One or more of the members of the Joint Venture, and/or its officers, employees, or agents have had knowledge of the physical occupancy of the premises in question by ZETLEY since October 1983.

5) MARVIN A. ZETLEY, defendant, is a citizen and resident of the metropolitan area of Milwaukee, Wisconsin, and is an investor engaged in nursing home, pharmaceutical, and real estate businesses.

6) Prior to May 20, 1982, ZETLEY was the owner of a parcel of real estate at 9418 North Green Bay Road, Milwaukee,

Wisconsin, consisting of indoor and outdoor tennis facilities, outdoor swimming pool, and clubhouse with bar, restaurant, and locker room facilities, which was known as Brown Deer Racquet Club.

7) On May 20, 1982, ZETLEY entered into a trade transaction with KENNETH E. ALLES, one of the third-party defendants, individually, and as a principal officer of the C & C DEVELOPMENT, INC., the other third-party defendant, both of whom were Florida residents and citizens, for the exchange of ZETLEY'S equity in 9418 North Green Bay Road, Milwaukee, for condominium Units 505, 1204, and Penthouse Unit 2 (also referred to as "H" in Xanadu, which was a condominium then under construction in Cocoa Beach, Florida.

8) Simultaneous with the closing of May 20, 1982, Brown Deer Racquet Club, Inc., a Wisconsin corporation signed a lease for the restaurant and bar portion of the premises with ZETLEY guaranteeing the lease. The lease was to terminate on April 30, 1984.

9) On the same date, ALLES, in behalf of C & C, entered into a written Land Contract (similar to a Florida contract for Sale) with Mequon Racquet Club, a Wisconsin limited partnership, subject to the lease with Brown D[illegible]r Racquet Club, Inc. The price stated in the Land Contract was One Million, Two Hundred Sixty Seven Thousand, Two Hundred and no/100 ($1,267,200.00) Dollars.

10) On October 31, 1980, a Joint Venture Agreement was entered into between XANADU OF COCOA BEACH, INC., a Florida corporation, which was, and is, a wholly owned subsidiary of Towne Realty, Inc., a Wisconsin corporation, and Sunflower Club, Inc., a Florida corporation, which contained a Guaranty executed by KENNETH E. ALLES, individually. The Joint Venture Agreement was intended to cover the development of the Xanadu Condominium; an Amendment to

the Joint Venture Agreement was executed December 15, 1981 by Towne Realty, Inc. (the parent corporation of XANADU OF COCOA BEACH, INC.), ALLES, individually, as guarantor, and as an officer of Sunflower Club, Inc., and by Joseph J. Zilber, as Chairman of the Board of XANADU OF COCOA BEACH, INC.

11) The Xanadu condominium was completed in the Spring of 1983, and Certificates of Occupancy were issued for the units in question.

12) Defendant executed the document which is identified previously as plaintiff's Exhibit 4 and Defendants Exhibit 35.

13) Repeated demands were made, unsuccessfully, by ZETLEY upon C & C and ALLES, in early 1984, for delivery of title to The Penthouse Unit.

8. CONCISE STATEMENT OF APPLICABLE PRINCIPLES OF LAW ON WHICH THERE IS AGREEMENT.

1) Federal Rules of Civil Procedure

2) Federal Rules of Evidence

3) Florida Statutes

4) Florida Substantive law as relates to plaintiff's Complaint.

5) Wisconsin Statutes

6) Wisconsin Substantive law as relates to Counterclaim of third-party defendants.

9. CONCISE STATEMENT OF ISSUES OF FACT WHICH REMAIN TO BE LITIGATED.

1) Whether plaintiff had knowledge of defendant's alleged interest in the subject condominium unit.

2) Is there a factual basis to warrant findings and conclusion of law applying the equitable doctrine of laches against the plaintiff, as relates to the continuous physical possession and occupancy of Penthouse Unit 2 by ZETLEY from early October, 1983, until service of a Summons and Complaint on ZETLEY on November 23, 1984?

3) Whether the Quit Claim Deed from the Xanadu Joint Venture to plaintiff corporation was executed to circumvent any legal or equitable interest the defendant alleges to possess regarding said condominium unit.

4) Determination of purpose, meaning, and intent of the execution of the Letter Agreement prepared by Towne Realty, Inc., and executed by ZETLEY on October 10, 1983, namely, was it a complete release of all claims ZETLEY had of any nature against Towne, XANADU OF COCOA BEACH, INC., and their officers, employees, etc., ~~or~~, only as relates to condominium Unit 1204, for which a deed was being delivered to ZETLEY'S nominee, O'Keefe Centre, Ltd.

5) Whether defendant possesses any legal or equitable ownership interest or possessory rights in said condominium unit which would be enforceable as to the plaintiff.

6) Whether plaintiff's title to condominium unit was slandered by virtue of defendant having filed and recorded a Notice of Lis Pendens on December 11, 1984, and what damages plaintiff suffered thereby.

7) Did ZETLEY misrepresent any material facts or defraud C & C and ALLES with respect to the original transaction on the Milwaukee real estate at 9418 North Green Bay Road.

8) What damages, if any, has C & C and/or ALLES suffered that ZETLEY should be liable for, as relates to the alleged misrepresentation and fraudulent conduct on the part of ZETLEY?

9) What damages is ZETLEY entitled to from XANADU OF COCOA BEACH, INC. if he does not receive title to Penthouse Unit 2?

10) What damages are due ZETLEY from C & C and ALLES?

11) Was Towne Realty, Inc. an alter ego of XANADU OF COCOA BEACH, INC.?

12) Whether KENNETH E. ALLES was at any time material to defendant's claim for relief an employee, servant, officer, director, shareholder, or agent of plaintiff, or whether he possessed any authority, either express, implied, or apparent, to action on behalf of or as an agent of the plaintiff.

13) If plaintiff prevails on its claim of ejectment, what damages is it entitled to recover from defendant, MARVIN A. ZETLEY.

10. CONCISE STATEMENT OF THOSE ISSUES OF LAW WHICH REMAIN FOR DETERMINATION BY THE COURT.

1) Applicability of equitable doctrine of laches to bar any defenses of plaintiff, XANADU OF COCOA BEACH, INC., against the Counterclaim of ZETLEY, thereby requiring delivery of unencumbered title to Penthouse Unit 2 in Xanadu Condominium to ZETLEY.

2) Whether defendant's claims are barred by reason of execution of document identified herein as plaintiff's Exhibit 4 - defendant's Exhibit 35.

3) Application of basic contract law relating to construction of ambiguities in contract documents against the person who drafted the document.

4) Applicability of Florida Statutes and Florida Substantive law entitling plaintiff to seek recovery of reasonable attorney's fees from ZETLEY.

5) Whether the agreements referred to in defendant's Answer and Counterclaim provide for an exclusive remedy of damages precluding an action for quiet title.

6) Whether the agreements referred to in third-party plaintiff's Complaint provide for an exclusive remedy of damages precluding an action for specific performance.

7) Whether specific performance relief is barred because the third-party defendants never possessed legal title to the subject condominium unit and therefore it is legally impossible to order third-party defendants to convey said condominium unit.

8) Whether third-party plaintiff is guilty of unclean hands and whether any equitable relief should therefore be denied.

9) Whether third-party defendant is entitled to a set-off in the event the third-party plaintiff prevails on its damages claim.

10) Is ZETLEY'S Counterclaim against XANADU OF COCOA BEACH, INC. barred by the Statute of Frauds?

11. APPLICATION OF FEDERAL RULES OF EVIDENCE AND CIVIL PROCEDURE

Counsel is unaware of any disagreement as to the application of the Federal Rules of Evidence or Civil Procedure.

12. LIST OF ALL MOTIONS OR OTHER MATTERS WHICH REQUIRE ACTION BY THE COURT.

1) Plaintiff filed a Motion for Summary Judgment to obtain Judgment on its Complaint, and to obtain dismissal of defendant's Counterclaim. Responsive pleadings in opposition, and a brief in opposition were submitted on August 22, 1985, to the Court by defendant's counsel. No decision has been rendered yet.

2) A Motion for a Protective Order was filed by counsel for defendant, ZETLEY, on November 5, 1985, seeking to quash and prohibit plaintiff's Request for Production of Documents directed to defendant, seeking the production of Federal Income Tax Returns filed by ZETLEY and/or Brown Deer Racquet Club, Inc. during the calendar years that ZETLEY operated the Brown Deer Racquet Club, issued by plaintiff's counsel on October 30, 1985, and received by defendant's counsel on November 4, 1985, in the U.S. Mail.

Respectfully submitted,

Dated at Cocoa Beach, Florida this 10th day of November, 1985.

/s/BRUCE W. JACOBUS
Attorneys for Plaintiff,
Xanadu of Cocoa Beach, Inc.

Dated at Milwaukee, Wisconsin this 13th day of November, 1985.

/s/IRVING D. GAINES
Attorney for Defendant,
Marvin A. Zetley

Dated at Cocoa Beach, Florida this 14th day of November, 1985.

/s/BRUCE W. JACOBUS
Attorneys for Third-Party
Defendants,
C & C Development, Inc., and
Kenneth C. Alles